HARVEY E. YATES CO.

IBLA 94-15 Decided January 14, 1997

Appeal from a decision of the Deputy State Director, Bureau of Land Management, New Mexico, upholding a notice of incident of noncompliance. SDR 93-026.

Affirmed.

1. Evidence: Burden of Proof--Oil and Gas Leases: Generally--Oil and Gas Leases: Incidents of Noncompliance

   A written notice of incident of noncompliance which correctly describes the violation but references the wrong authority will be upheld when the appellant fails to establish by a preponderance of the evidence that the violation did not exist.

APPEARANCES: Ernest L. Carroll, Esq., Artesia, New Mexico, for appellant; Margaret Miller Brown, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Harvey E. Yates Company (Heyco) has appealed an August 31, 1993, decision by the Deputy State Director (DSD), Bureau of Land Management (BLM), New Mexico, upholding a violation cited in a notice of incident of noncompliance (INC), and rescinding the assessment for the violation.

On June 17, 1993, a BLM inspector issued an INC citing Heyco with a violation of 43 CFR 3162.7-1 at Heyco's Young Deep Unit site in sec. 9, T. 18 S., R. 32 E., New Mexico Principal Meridian. The INC recited that there were 16 inches or 47.5 barrels (bbls) of oil in a fiberglass water tank, and that a 10- by 15-foot steel tank marked BS&B did not meet the requirements of a stock tank and contained 32 bbls of oil. The INC required Heyco to remove and sell or transfer the oil which had accumulated in the two tanks. It also required Heyco to submit truck manifest tickets documenting the oil sale or transfer.

The regulation cited in the June 17, 1993, INC, 43 CFR 3162.7-1, provides in part as follows:

> (a) The operator shall put into marketable condition, if economically feasible, all oil, other hydrocarbons, gas, and sulphur produced from the leased land.

> (b) Where oil accumulates in a pit, such oil must either be (1) recirculated through the regular treating system and returned to the stock tanks for sale, or (2) pumped into a stock tank without treatment and measured for sale in the same manner as from any sales tank in accordance with applicable orders and notices. In the absence of prior approval from the authorized officer, no oil should go to a pit except in an emergency. Each such occurrence must be reported to the authorized officer and the oil promptly recovered in accordance with applicable orders and notices.

On July 6, 1993, the BLM inspector telephoned Heyco requesting a FAX copy of the documentation required by the June 17, 1993, INC. On July 12, 1993, Heyco faxed the documentation. On the same day, Heyco received a second INC, issued by the inspector after a July 8, 1993, follow-up inspection (DSD Decision at 1-2). As a result of the follow-up, the inspector concluded that the violation had only been partially corrected. He found that there were still 8.8 bbls of oil in one of the tanks, and that a run ticket or manifest showing transfer or sale of oil had not been submitted to BLM. In the July 8, 1993, INC, the inspector assessed a fine of $500 per day until appellant performed the corrective action specified in the original INC.

On July 27, 1993, Heyco requested State Director Review (SDR). On August 3, 1993, Heyco made an oral presentation before the DSD, presenting evidence demonstrating that it had timely undertaken action to correct the violation cited in the INC.

From the evidence presented, the DSD found that Heyco had timely complied with the INC by transferring the oil accumulated in the tanks back to the production facilities and surmised that the oil found in the water tank on the follow-up inspection more than 20 days later may have been "new oil." He stated that BLM policy requires timely follow-up inspections, but that the BLM inspector's follow-up inspection had not been timely. The DSD further ruled:

> A manifest is not specifically required by regulation when oil is transferred within lease boundaries, and failure to submit documentation within 48 hrs in this case does not meet the criteria of a major violation. Therefore, the Hobbs office should have issued a second INC notifying [Heyco] that they were in violation of the written order to submit the oil transfer documentation and given a reasonable time frame to comply (pursuant [to] 3163.1(a)).

(Decision at 4).

Accordingly, the DSD rescinded the assessment.

The DSD found, however, that the evidence established a violation of New Mexico NTL No. 92-3, requiring water disposal tanks and pits to be kept reasonably free of oil. NTL No. 92-3 provides in part as follows:

> The operator is responsible for maintaining equipment that prevents oil accumulating in water disposal pits and tanks. When water is removed from the lease for disposal, oil that has accumulated in the disposal pit or tank must be placed back into the production/sales system before the water is removed.
>
> All pits or tanks used for disposal or holding of produced water that are not subject to sealing requirements of Onshore Order No. 3 shall be kept reasonably free of oil (0.2 percent by volume). For example, a full 300 bbl capacity tank, 16' high (approximately 1.56 bbls/inch) may contain no more than 0.6 bbls. or 0.38 inches (16' x 12" X .002) of free oil. The same tank, half full of water (8 feet) may contain no more than 0.3 bbls. or 0.19 inches of free oil.

Although the INC referenced 43 CFR 3162.7 rather than NTL No. 92-3, the DSD concluded that the "violation existed and is hereby upheld" (Decision at 3-4).

Heyco contends that the DSD abused his discretion in upholding the violation because neither of the INC's cited NTL No. 92-3. Accordingly, Heyco alleges, its ability to present its case before the DSD was compromised, and it failed to clearly understand the nature of the violation until it received the decision now on appeal.

Heyco does not deny that the tanks contained oil as cited in the June 7, 1993, INC. It argues, however, that 43 CFR 3162.7-1 is inapplicable because it refers to pits, and not tanks. Further, Heyco argues that NTL No. 92-3 does not apply because it established standards pursuant to NTL 2-B part V.4, which refers to oil accumulating in lined or unlined pits, not steel or fiberglass tanks. Moreover, Heyco asserts that NTL Nos. 92-3 and 2-B refer to water disposal pits, not steel or fiberglass tanks.

Heyco challenges as arbitrary the phrase "reasonably free of oil" contained in NTL No. 92-3. Heyco asserts that 0.2 percent or less value "places an operator in jeopardy of in one moment being in compliance with the regulation and in the next moment violating it" (Statement of Reasons (SOR) at 9). Heyco suggests that where oil accumulates in tanks in the absence of an operator's negligence or willfulness, such tanks should be deemed "reasonably free of oil."

Heyco also charges that the DSD "glossed over" whether a manifest reflecting the transfer of the oil was required by the regulations. Heyco points out that 43 CFR 3163.1(a) covers the issuance of written notices of violation and does not refer to manifests documenting oil transfer. Heyco contends that with respect to the manifest, "[t]he INC on this manifest was not rescinded" and BLM has "failed to address * * * whether an operator can be found guilty of doing something that the BLM had no authority to require in the first place" (Reply at 5).

Finally, Heyco argues it was denied "a fair hearing and an adequate opportunity to explain its position" (SOR at 11) because the regulation cited in the INC was inapplicable. Heyco asserts that the DSD's finding that it was in violation of NTL 92-3 "violates the due process clause of the United States Constitution and the Constitution of the State of New Mexico" (Reply at 1).

Counsel for BLM submitted an answer incorporating a response by the DSD. The DSD notes that most earthen pits have been replaced by fiberglass tanks which hold produced water until it can be properly disposed of. The DSD explains that tanks must be kept reasonably free of oil to prevent unauthorized and unmeasured removal of oil. Further, the DSD states that the Roswell District is evaluating the 0.2 percent limit of oil allowed in water tanks as required by NTL No. 92-3.

[1] A party challenging an INC has the burden to overcome by a preponderance of the evidence BLM's prima facie case that conditions existed which violated Departmental regulations. Yates Petroleum Corp., 91 IBLA 252, 258 (1986).

Heyco has not met this burden. The record indicates that Heyco corrected the violation charged in the June 17, 1993, INC by transferring the oil on June 22, 1993. The file contains a work ticket from Crain Hot Oil Service dated June 22, 1993, describing the oil transfer. This ticket was submitted to the DSD as evidence of the transfer. The facts of the transfer are also narrated in Heyco's SOR on page 3.

In enforcement proceedings, the basic standards are those of fundamental fairness and procedural due process. Thus, an INC must inform the operator of the nature and extent of the specific condition on the lease which has been found to constitute a violation, and the specific manner in which it is to be abated. See Renfro Construction Co., 2 IBSMA 372, 87 I.D. 584, 587 (1980). The INC at issue meets that test.

The facts show that Heyco executed the required corrective action and came to the DSD review fully prepared. These circumstances render untenable Heyco's stance on appeal that it lacked proper notice, was hindered in making its case, or was in some other way deprived of due process. Any possibility that Heyco was deprived adequate notice vanishes in the absence of any evidence that Heyco was confused about the nature of the alleged violation. See Island Creek Coal Co., 2 IBSMA 125, 130; 87 I.D. 304, 306 (1980). Moreover, Heyco exercised its due process rights when it requested and was granted SDR, and its appeal to this Board further satisfies due process requirements. Davis Exploration, 112 IBLA 254 (1989).

Heyco's arguments respecting the applicability and/or effect of NTL No. 92-3 are also without substance. NTL No. 92-3 was issued pursuant to 43 CFR 3162.1-7, 3164.2, and NTL No. 2-B on December 24, 1991, for the purpose of establishing standards for the accumulation of oil in water pits

and tanks. Public comments were invited at a BLM/industry meeting in Albuquerque in May 1991. NTL No. 92-3 notified operators that violations of its standards would result in the issuance of an INC pursuant to 43 CFR 3163.1. NTL No. 92-3 was in force at all relevant times herein. As is evident from its plain language, NTL No. 92-3 refers to tanks and clearly covers the situation described in the INC under review. The fact that NTL No. 92-3 was issued pursuant to NTL No. 2-B has no dispositive relevance. Regulation 43 CFR 3164.2 authorizes BLM to issue NTL's "when necessary to implement the onshore oil and gas orders and regulations in this part." As a properly issued implementing rule, NTL No. 92-3 had the force and effect of law, and was therefore a proper legal basis for the issuance of the June 17, 1993, INC, describing a violation of its requirements. See ANR Production Co., 118 IBLA 338 (1991).

Heyco's objection to the 0.2 percent limiting figure for oil in tanks is misplaced before the Board. Such objections are properly advanced at the comment period provided in conjunction with the promulgation of such rules.

Heyco complains that the DSD failed to cover the issue of whether a manifest documenting transfer of oil was required by the regulations. As indicated earlier, the DSD answered this question with respect to the specific case before him when he ruled that "[a] manifest is not specifically required by regulation when oil is transferred within lease boundaries" (Decision at 4). While Heyco is correct that 43 CFR 3163.1(a) does not cover manifests, that regulation does cover "the requirements of any notice or order." In this case the June 17, 1993, INC required Heyco to "submit * * * a truck manifest ticket." This request was thus a "requirement" of a notice with which the party cited was required to comply under 43 CFR 3163.1(a). Accordingly, the DSD did not err in his conclusion that under the regulation, failure to submit such documentation would constitute a minor violation and should properly have been the subject of a second INC. See 43 CFR 3163.1(a)(2). The regulations give BLM broad discretion to oversee and account for oil and gas during the entire period before sale, whether these products are found at the well head, in a pipeline or in a storage tank on the leasehold. See Harvey E. Yates Co., 135 IBLA 373, 377 (1996).

To the extent Heyco has raised arguments which we have not specifically addressed herein, they have been considered and rejected.

We conclude that the DSD properly upheld the violation charged in the June 17, 1993, INC, and that, since Heyco timely abated the violation, he properly rescinded the assessment of liquidated damages.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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John H. Kelly
Administrative Judge

I concur:

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R. W. Mullen
Administrative Judge